

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 19 October 2021

Public Authority: DHSC
Address: 39 Victoria Street
London SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information relating to minutes of the Joint Biosecurity Centre.
2. The Commissioner's decision is that Department of Health and Social Care (DHSC) has correctly applied section 35(1)(a) - formulation or development of government policy to the withheld information.
3. The Commissioner does not require the DHSC to take any steps as a result of this decision notice.

Request and response

4. On 11 September 2020, the complainant wrote to DHSC and requested information in the following terms:
"... the minutes of meetings where the Joint Biosecurity Centre has discussed the issue of quarantine and/or testing for people arriving into the U.K. from overseas."
5. DHSC responded on 7 October 2020 and refused to provide the requested information citing section 35(1)(a) as its basis for doing so.
6. Following an internal review DHSC wrote to the complainant on 15 October 2020 and maintained its position.

Scope of the case

7. In his request for internal review the complainant stated:

"The request was for the minutes of the meetings where quarantine decisions for arrivals from overseas to the U.K. were discussed. Given that the minutes record the details of the meetings that have already taken place this relates to decisions already taken and not future policy. Furthermore, statistical data used to make those decisions once it has been made is not exempt under Section 35 and should therefore be released.

There is an overwhelming public interest in these decisions due to the devastating impact it is having on the aviation, tourism and travel sectors as well as the economy as a whole. The argument that the minutes of the meetings must be withheld due to the requirement for a safe space is specious - public scrutiny of these decisions, which are largely nonsensical to begin with, would likely lead to a more thorough decision making process and would actually benefit future policy. It does a disservice to the integrity of those making the decisions that they would withhold their opinions or expertise if it was subject to public scrutiny; they are, after all, providing a public service."

8. The complainant contacted the Commissioner on 18 October 2020 to complain about the way his request for information had been handled and stated:

"I do not believe the public interest test was appropriately applied. The DHSC is applying inconsistent criteria to their releases as minutes of SAGE are being released to the public and it appears that the decision to withhold the requested information is political. None of the points I raised for the internal review were responded to."

9. The Commissioner considers the scope of her investigation to be to determine if DHSC was entitled to rely on section 35(1)(a) to withhold the requested information.

Reasons for decision

Section 35(1) – formulation or development of government policy

10. Section 35(1)(a) FOIA provides that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to -

(a) the formulation or development of government policy"

11. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
12. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers.
13. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
14. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
15. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant Minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
16. DHSC explained that the policy in question relates to The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (legislation.gov.uk)

(Please note the statutory instrument that covers the existing general travel regulations; the statutory instrument that covers the existing operator liability regulations; and the statutory instrument that covers the existing passenger information regulations.)
17. It considers the formulation/development of this particular policy (or policies) to have been ongoing at the time the request.
18. Therefore, the information requested remains relevant to future policy decisions, including what, if any, measures could or should be introduced with regard to international travel.

19. It is clear that the information requested meets the key indicators referred to above and therefore the Commissioner considers that the exemption is engaged.

Public interest test

Public interest arguments in favour of disclosing the information

20. The DHSC recognises that there is a general public interest in the transparency of the processes leading up to a decision being made. There is a general public interest in being able to understand better the way in which the Government works and how or why decisions are made.
21. The complainant argued:
- The request was for the minutes of the meetings where quarantine decisions for arrivals from overseas to the UK were discussed. Given that the minutes record the details of the meetings that have already taken place this relates to decisions already taken and not future policy.
 - Furthermore, statistical data used to make those decisions once it has been made is not exempt under Section 35 and should therefore be released.
 - There is an overwhelming public interest in these decisions due to the devastating impact it is having on the aviation, tourism and travel sectors as well as the economy as a whole.
 - The argument that the minutes of the meetings must be withheld due to the requirement for a safe space is specious - public scrutiny of these decisions, which are largely nonsensical to begin with, would likely lead to a more thorough decision-making process and would actually benefit future policy.
 - It does a disservice to the integrity of those making the decisions that they would withhold their opinions or expertise if it was subject to public scrutiny; they are, after all, providing a public service.

Public interest arguments in favour of maintaining the exemption

22. DHSC considered public exposure could deter from full, candid, and proper deliberation of policy formulation and development, including the exploration of all options. This is relevant to all three documents used.
23. Two are used in ministerial conversations, and the third are minutes where Chief Medical Officers are present, and the methodology is discussed.

24. Civil servants and subject experts need to be able to engage in the free and frank discussion of all the policy options internally, to expose their merits and demerits and their possible implications as appropriate. As mentioned in the paragraph above, these were discussions regarding the development of policy that was ongoing.
25. Premature disclosure of information protected under section 35 could prejudice good working relationships and the neutrality of civil servants when working collaboratively with other foreign states. The release of all three documents in scope could potentially risk prejudicing those strong and important relationships by disclosing information at this time that we deem as sensitive and not fit for potential publication.
26. Ministerial decisions relating to the extent of international travel have been a live and developing policy with the need to protect public health against the COVID-19 pandemic. There is a strong public interest argument to preserving a 'safe space' for officials to debate issues away from external scrutiny, due to the very high interest in the pandemic generally and the red list in particular, this exemption is paramount in ensuring free and frank views are able to be exchanged and preserving the principle of collective responsibility.

Balance of the public interest

27. Whilst there is a 'general public interest in promoting openness and transparency in Government', the information was exempt from disclosure because withholding ensures 'that the full, candid and proper deliberation of policy formulation and development is not influenced or impacted by the possibility of public exposure'.
28. The topic covered by the information is likely to be of great public interest considering the decisions affected everybody in the country along with many foreign individuals. However, the policy that was made at the time was an ongoing policy which is continuing to the present day (and it was reasonable for it to be foreseen at the time that the policy would continue to be developed). There is a risk that disclosure of this material may lead to further requests for records of other similar discussions to be requested which could influence the openness and freedom of the attendees at the relevant meetings.
29. Furthermore, the Government was open to a certain extent and did provide reasons at the time as to why it made the decisions it did. Therefore, on balance, DHSC consider that the public interest does not outweigh withholding the information and the department is justified in not disclosing the relevant material.
30. DHSC further explained that to make sure due regard has been given to the request, another independent review has been carried out by a senior civil servant who has the following views:

"The information that was presented as slides at the JBC Technical Board meeting relevant to this FOI request is marked as OFFICIAL-SENSITIVE. The slide pack contains diplomatically sensitive information, and meeting minutes for the JBC Technical Board discuss various options for policies under development. These are still relevant to options for policies that remain in discussion today. Summaries of COVID O meetings are marked OFFICIAL-SENSITIVE, contain discussions of policy under formulation, and are typically only distributed to a very limited readership due to this sensitivity.

Release of this information was discussed with SCS colleagues in the Cabinet Office, who remain of the opinion that release of this information would impact the Government's ability to make future policy decisions."

Commissioner's decision

31. The Commissioner notes the complainant's argument that the meetings have already taken place and the minutes relate to decisions already taken and not future policy. However, at the time of the request, only one meeting had been held.
32. Also, at the time of the request the pandemic was far from over, although some decisions may have been made at this meeting it was highly likely that they would feed into the formulation of future policy decisions in this area which was and still is, under regular review.
33. In addition, DHSC reviewed the request prior to submitting its arguments to the Commissioner to consider if there had been a significant change in circumstances that would allow the information to be disclosed. However, it maintained that section 35 was still applicable.
34. It is therefore the Commissioner's decision that, given the timing of the request, the stage that DHSC was at, and the relevance to future policy decisions, the public interest rests in maintaining the exemption.

Right of appeal

35. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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